PACIFIC SANCTUARY HOLDINGS SDN BHD v. MASALAND CONSTRUCTION SDN BHD

COURT OF APPEAL, PUTRAJAYA
KAMARDIN HASHIM JCA
RHODZARIAH BUJANG JCA
MOHAMAD ZABIDIN MOHD DIAH JCA
[CIVIL APPEAL NO: S-02(IM)-2016-10-2018]
31 JANUARY 2020

CIVIL PROCEDURE: *Judgments and orders – Enforcement – Enforcement of judgments and orders after lapse of six years – Whether leave application for enforcement of judgments and orders supported by affidavit explaining reasons for delay – Whether statutory requirements satisfied – Rules of Court 2012, O. 46 r. 3*

The appellant ('defendant'), a company carrying the business of property development, entered into an agreement with Majlis Kebajikan dan Rekreasi Kakitangan Kerajaan, Sabah ('MAKSAK') to develop MAKSAK's land into a mixed and commercial *cum* office complex ('project land'). The new shareholders of the defendant later discovered that there was a pending suit filed by the respondent ('plaintiff') against the defendant where a default judgment ('2009 judgment') was entered and damages in the amount of RM10,301,791 were awarded to the plaintiff ('2011 judgment'). The defendant was unsuccessful in its attempt to set aside the default judgment and the award of damages. The plaintiff then presented a winding-up petition against the defendant and the parties entered into a settlement agreement where (i) the plaintiff agreed not to enforce any and/or all of its claims under the judgment and to withdraw the winding-up proceedings in consideration of the defendant agreeing to pay the plaintiff the sum of RM11,627,834.76 by way of cash payment and contra of properties which were being erected on the project's land; and (ii) by virtue of cl. 10, upon full settlement of the settlement sum, there shall be no further and/or any claims against the defendant under the 2009 and 2011 judgments. According to the defendant, it had fully carried out its part of the bargain under the settlement agreement by (i) making cash payment of RM5,000,000, plus accrued interest of RM244,494.89, to the plaintiff; and (ii) executing sale and purchase agreements to convey ten units of the commercial lots in the defendant's development, which were still under construction, to the plaintiff. However, after a lapse of almost six years, the defendant received (i) a notice of termination in relation to the settlement agreement from the plaintiff; and (ii) a notice pursuant to s. 466 of the Companies Act 2016 ('statutory notice'), claiming the sum of RM8,603,256.56 in respect of the 2011 judgment. In response to the statutory notice, the defendant argued that (i) the plaintiff's demand was without any basis; (ii) the judgment debt under the civil suit had

A been fully settled down by contra and cash payments; and (iii) its obligation to pay the judgment debt had effectively been subsumed in the settlement agreement and, as such, the plaintiff could not rely on the 2011 judgment as evidence of the defendant's indebtedness to issue the statutory notice. The plaintiff later withdrew the statutory notice and, instead, applied for leave B under O. 46 r. 2 of the Rules of Court 2012 ('ROC'), at the High Court, to proceed with the execution of the 2009 and 2011 judgments and orders on the grounds that the defendant had breached the settlement agreement and the plaintiff had terminated the settlement agreement. The Deputy Registrar dismissed the plaintiff's leave application. Dissatisfied with the said decision, C the plaintiff appealed to the judge-in-chambers and the appeal was allowed. Hence, the present appeal by the defendant.

Held (allowing appeal with costs):

(1) The leave applied by the plaintiff, to execute the 2009 and 2011 judgments and orders, was made under O. 46 rr. 2(1)(a) and 3 of the D ROC. The application must be supported by an affidavit stating or explaining the reasons for the delay. However, the affidavit-in-support of the plaintiff's leave application did not disclose any explanation as to the reasons for the delay in enforcing the judgments and/or order offered by the plaintiff. On this ground alone, there was sufficient ground for the E Judicial Commissioner ('JC') to decline to exercise his discretion to grant leave to the plaintiff to proceed with the execution against the defendant. Since there was no explanation given by the plaintiff for the delay, it was clear that the plaintiff failed to satisfy the requirements stipulated under O. 46 r. 3 of the ROC. (paras 18 & 20)

F **(2)** The JC erred in law and in fact, in granting leave to the plaintiff, by failing to take into consideration that there was no longer any pending judgments and/or orders of the court to be enforced as the said judgments/orders have been superseded or extinguished by the settlement agreement entered between the parties. The settlement G agreement constituted a new and independent agreement for good consideration. Its effect was to supersede the original cause of action altogether and to put an end to the proceedings, which were spent and exhausted. The parties were, therefore, precluded from taking any further steps in the action. (para 21)

H **(3)** Even if the defendant had defaulted in the payments under the settlement agreement, which was denied by the defendant, the plaintiff's remedy was confined to taking a fresh action to enforce the settlement agreement and not by way of executing the 2009 and 2011 judgments and/or order which was rendered otiose by the settlement agreement. (para 26)

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Case(s) referred to:

Affin Bank Bhd v. Wan Abdul Rahman Wan Ibrahim [2003] 1 CLJ 826 CA ***(refd)***

Green v. Rozen [1955] 1 WLR 741 ***(refd)***

Indian Overseas Bank v. Motorcycle Industries [1973] Pte Ltd and Others [1992] 3 SLR (R) 841 ***(foll)***

Sambu (M) Sdn Bhd v. Stone World Sdn Bhd (Formerly Known As Kostone Sdn Bhd) & Anor [1996] 2 CLJ 523 HC ***(refd)***

Turf Club Auto Emporium Pte Ltd and Others v. Yeo Boong Hua and Others and Another Appeal And Other Matters [2017] 2 SLR 12 ***(refd)***

Legislation referred to:

Companies Act 2016, s. 466

Rules of Court 2012, O. 46 rr. 2(1)(a), 3(2)(b), O. 56

Rules of the High Court 1980, O. 46 r. 2(1)

For the appellant/defendant - Norbert Yapp & Eow Ee Pei; M/s Norbert Yapp & Assocs
For the respondent/plaintiff - Baldev Singh; M/s Baldev Gan & Assocs

[Editor's note: Appeal from High Court, Kota Kinabalu; Suit No: K-22-52-2007 (overruled).]

Reported by Najib Tamby

JUDGMENT

Kamardin Hashim JCA:

Introduction

[1] This is an appeal against the decision of the learned Judicial Commissioner ('learned JC') given at Kota Kinabalu on 20 September 2018 allowing the respondent's appeal against the decision of the Deputy Registrar dated 6 July 2018 dismissing the respondent's application under O. 46 r. 2 of the Rules of Court 2012 ('ROC 2012') for leave to commence execution proceedings against the appellant pursuant to a judgment of the High Court granted on 7 January 2011 and the order and judgment of the High Court granted on 28 September 2009 although six years had lapsed since the making of the judgment and order.

[2] After having heard and considered the parties' submissions, both oral and written on all the issues ventilated before us, we had allowed the appeal. We now give our reasons.

[3] For the purpose of this judgment, the parties will be referred to as they were in the High Court.

Salient Background Facts

[4] The facts of the case are not in dispute and have been succinctly laid out in the written submission of learned counsel for the appellant which we now reproduce with some modifications. The defendant is a private limited company incorporated in Malaysia on 13 February 1996 and carries on business of property development.

[5] On 22 May 1997, the defendant entered into a development agreement with one, Majlis Kebajikan Dan Rekreasi Kakitangan Kerajaan ('MAKSAK'), Negeri Sabah to develop MAKSAK's land held under Town Lease No. 017546431 measuring 10.11 hectares more or less situated along the Ceremonial Drive at Likas Bay in the District of Kota Kinabalu, Sabah into a mixed and commercial cum office complex ('the project land').

[6] Subsequently, MAKSAK and the defendant mutually agreed to change the proposed development into a proposed KK Mega Mall, 12-storey office complex, 10-storey MAKSAK Hotel, 2-storey Civil Service Museum, 2-storey administrative blocks and associated works. There was subsequently a change of shareholders in the defendant.

[7] After new shareholders had taken over the full control and management of the defendant, they discovered that there was a pending suit filed by the plaintiff against the defendant where a default judgment was entered on 28 September 2009 and for damages to be assessed. This was subsequently done by the learned Senior Assistant Registrar on 7 January 2011 where a sum of RM10,301,791.40 was awarded to the plaintiff. The defendant was not represented during the assessment of damages hearing as counsel on record had discharged herself from acting for the defendant. The defendant through its new solicitors applied to set aside the default judgment and award of damages but were not successful.

[8] The plaintiff then presented a winding-up petition against the defendant under Companies (Winding-Up) No. 28-54-2011. The defendant had no choice but to seek a compromised settlement with the plaintiff in order not to jeopardise the ongoing project. Following a series of discussions, the defendant and the plaintiff mutually entered into a settlement agreement dated 28 May 2012. Under the terms of the said settlement agreement, the plaintiff agreed not to enforce any and/or all of its claims under the judgment and to withdraw the winding-up proceedings under Companies (Winding-Up) No: 28-54-2011 in consideration of the defendant agreeing to pay the plaintiff the sum of RM11,627,834.76 by way of cash payment and contra of properties which were being erected on the project land.

[9] Pursuant to the said settlement agreement, the defendant made cash payment of RM5,000,000 plus accrued interest of RM244,494.89 to the plaintiff. That the cash payment was made is an undisputed fact. In addition, the defendant had duly executed the relevant sale and purchase agreements to convey the ten units of the commercial lots in the defendant's development to the plaintiff. The ten units are Lot 242, 243, 244, Lot D44, D45, D46, D47, D146, Lot 290 and 291 respectively. The ten units were under construction when the dispute arose. The defendant alleged that they had fully carried out their part of the bargain under the settlement agreement.

[10] By cl. 10 of the settlement agreement, it is expressly provided that upon full settlement of the settlement sum, there shall be no further and/or any claims against the defendant under the judgments dated 28 September 2009 and 7 January 2011 respectively.

[11] However, after a lapse of almost six years, the defendant received a purported notice of termination dated 10 January 2018 in relation to the settlement agreement from the plaintiff's solicitors. The defendant responded to the said notice of termination *vide* their solicitors' letter dated 30 January 2018 denying all the allegations made by the plaintiff pertaining to the alleged breaches committed by the defendant.

[12] On 24 January 2018, the defendant received a notice pursuant to s. 466 of the Companies Act 2016 dated 24 January 2018 ('statutory notice') issued by Messrs Balder Gan & Associates claiming the sum of RM8,603,256.56 as at 23 January 2018 in respect of the judgment dated 7 January 2011. The defendant through its solicitors responded to the statutory notice on 30 January 2018 stating that the plaintiff's demand was without any basis. It is the defendant's contention that the judgment debt under the said civil suit had been fully settled by way of contra of ten units of the commercial units valued at RM6,178,845 and the rest by cash payment of RM5,244,494.89. The defendant further states that its obligation to pay the judgment debt had effectively been subsumed in the settlement agreement dated 28 May 2012 and as such, the plaintiff cannot rely on the judgment dated 7 January 2011 as evidence of the defendant's indebtedness to issue the statutory notice.

[13] However, the plaintiff refused to withdraw the statutory notice. The defendant then filed a *Fortuna* injunction application against the plaintiff *vide* Originating Summons No. BKI-24NCVC-21-2-2018 ('OS 21/2'). During the hearing of the OS 21/2 on 12 March 2018, the plaintiff's solicitors informed the court that it is withdrawing the statutory notice against the defendant thus rendering the *Fortuna* injunction application academic.

[14] On 19 April 2018, the plaintiff applied for leave under O. 46 r. 2 of the ROC 2012 to proceed with the execution of the judgments and order of the High Court dated 28 September 2009 and 7 January 2011.

[15] In the plaintiff's affidavit in support dated 19 April 2018 at para. 8, the sole ground relied on by the plaintiff was that the settlement agreement dated 28 May 2012 was allegedly breached by the defendant and that the plaintiff had terminated the said agreement on or about 10 January 2018. There was no explanation why the plaintiff had waited for more than six years to levy execution on the judgments and order as required by O. 46 r. 3(2)(b) of the ROC 2012. What was merely stated by the plaintiff was that there are just circumstances meriting the application.

[16] On 6 July 2018, the learned Deputy Registrar dismissed the plaintiff's leave application. No grounds of decision were made available. Dissatisfied with the decision of the learned Deputy Registrar, the plaintiff lodged an appeal to the judge in chambers under O. 56 of the ROC 2012 on 18 July 2018. On 20 September 2018, the learned JC allowed the plaintiff's appeal and granted leave to the plaintiff to levy execution on the said order and judgments.

Our Deliberation And Decision

[17] The learned JC in allowing the plaintiff's appeal gave the following reasons at pp. 189-191 of the supplementary record of appeals:

> It is clear from the above passage that by entering into the agreement the bank's claim against the respondents had been compromised and there was no longer a basis for the bank to rely on the judgment which was subsequently entered by the parties.
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> In the present case, after the judgment was obtained the Agreement was entered into between the parties. I agree with Plaintiff that Judgment was only to regulate the payment of the Judgment sum subject to the terms of the Agreement.
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> In this case the terms of the Agreement where the Plaintiff may rely upon to execute the Judgment in the event, that there was a breach of the terms are clearly spelt out in Clause 3 of the Agreement.
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> **In such an event the First Party shall be entitled at its discretion to continue with or to recommence the Winding-Up Proceedings and any other form of all execution proceedings against the Second Party.**
>
> Having decided that principles in *Indian Overseas* are not applicable to the present facts, this Court in the circumstances of the case is vested with the discretion on whether to allow the Plaintiff to execute the judgment even though a period of 6 years had lapsed.
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> In this respect, in determining the present application, the two authorities cited by the Plaintiff also served as a guidance for this Court in exercising its discretion.
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> In *Public Bank Bhd v. Seato Trading (M) Sdn Bhd & Ors* [1996] 1 MLJ 165, the Court stated as that granting leave to execute judgment is a discretionary exercise by the Court. The Court accepts negotiations, settlements or part payments between parties as a valid reason for not executing judgments. However, when the negotiations, settlement or payments terminates or ceases then the Court would accept the above as valid reason for the delay and exercise discretion to grant leave to execute.
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> Learned counsel for the Plaintiff also cited the case of *Malayan Banking Bhd v. Foo See Moi* [1981] 2 MLJ 17 which is somewhat similar to the facts of the present case. In *Malayan Banking*'s case, the judgment in default for RM674,539.53 was similarly not executed because of the subsequent

agreement between parties. The Defendant agreed to pay part of the judgment sum immediately and the balance by installments. Subsequently, there was a breach and RM50,000 balance remain unpaid, the defendant asked for more time. The Plaintiff then rescinded the agreement and demanded the balance of the judgment. On appeal the Federal Court allowed the Plaintiff application for leave to execute the judgment.

Coming back to the present case, based on the facts that as the parties had intended to give effect to the terms of the Agreement, the delay was not unreasonable and this is a ground for the Court to exercise its discretion to allow the Plaintiff for leave to execute the judgment even though the 6 years' period had elapsed.

[18] The leave applied by the plaintiff to execute the two judgments and order respectively was made under O. 46 rr. 2(1)(a) and 3 of the ROC 2012. The application must be supported by an affidavit stating or explaining the reasons for the delay. Order 46 r. 2(1)(a) and r. 3 were in the following terms:

O. 46 r. 2(1) A writ of execution to enforce a judgment or order may not be issued without the leave of the Court in the following cases:

(a) Where six years or more have lapsed since the date of the judgment or order;

3(1) An application for leave to issue a writ of execution may be made *ex parte* by a notice of application in Form 88.

(2) Such an application shall be supported by an affidavit

(a) identifying the judgment or order to which the application relates and, if the judgment or order is for the payment of money, stating the amount originally due thereunder and the amount due thereunder at the date of the application;

(b) stating, where the case falls within rule 2(1)(a), the reasons for the delay in enforcing the judgment or order;

[19] In *Affin Bank Bhd v. Wan Abdul Rahman Wan Ibrahim* [2003] 1 CLJ 826 where the appellant as the plaintiff in the court below applied pursuant to O. 46 r. 2(1) of the old Rules of the High Court 1980 (in *pari materia* with O. 46 r. 2(1) of the ROC 2012) for leave to commence execution proceedings against the defendant after six years had lapsed from the date of judgment. The application was dismissed by the trial judge on the basis that the appellant failed to furnish cogent and acceptable reasons for the grant of leave. In dismissing the plaintiff's appeal, this court through Arifin Zakaria JCA (as he then was) stated that:

A It is trite that the grant of leave under O. 46 r. 2 is in the court's discretion. Order 46 r.3 states that an application under O.46 r.2(1) must be supported by and affidavit stating, when the case falls within r. 2(1)(a), the reasons for the delay in enforcing the judgment or order. Therefore, it is incumbent upon the applicant to furnish the court with sufficient reason in support of such an application. What is sufficient reason? This naturally B will vary from case to case. It is not possible for this court to provide an exhaustive list of what is considered to be sufficient reason.

[20] We had perused the affidavit in support of the plaintiff's leave application at pp. 19-22 of the appeal record part B and we could not find any explanation as to the reasons for the delay in enforcing the judgments C and/or order offered by the plaintiff. On this ground alone, in our view, there was sufficient ground for the learned JC to decline in exercising his discretion to grant leave to the plaintiff to proceed with the execution against the defendant. Since there was no explanation given by the plaintiff for the delay, it is thus clear that the plaintiff has failed to satisfy the requirements D stipulated under O. 46 r. 3 of the ROC 2012.

[21] Another point is that we agree with learned counsel for the defendant's submission that the learned JC had erred in law and in fact in granting leave to the plaintiff for failure by the learned JC to take into consideration that there is no longer any pending judgment and/or order of the court to be E enforced as the said judgments and/or order have been superseded or extinguished by the settlement agreement entered between the parties on 28 May 2012. The settlement agreement constitutes a new and independent agreement for good consideration. Its effect in law is to supersede the original cause of action altogether and put an end to the proceedings, which are F thereby spent and exhausted. The parties are therefore precluded from taking any further steps in the action.

[22] We observed that the learned JC relied on cl. 3 of the settlement agreement to execute the judgments and/or order which in our view was plainly wrong and misconceived in law and in fact due to the undisputed fact G that the cash payment of RM5,000,000 was honoured by the defendant. Clause 3 is only applicable in circumstances where any one of the post-dated cheques totaling RM5,000,000 is returned dishonoured.

[23] The position taken by the plaintiff was that the defendant had breached the settlement agreement in particular cl. 5 which stated that balance H payment by the contra of and transferring of ten units of clean and unencumbered properties under construction over the project land. The plaintiff alleged that the defendant had breached the said settlement agreement by wrongful taking a bridging loan and changing and encumbering the contra properties to the bank.

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[24] The defendant's counsel submitted and to which we are in agreement with, that by taking a bridging loan to finance the project and to build the ten property units does not amount to a breach of the said clause. The ten units were still under construction and cl. 8 of the settlement agreement allowed the defendant to charge the project land for bridging financing or loan. Clause 8 is in the following words:

> 8. The First Party shall be entitled to assign transfer or charge any or all of the Contra Units to a third party or third parties. The Second Party hereby agrees to give its consent to such assignment transfer or charge and to undertake to deliver the subsidiary or strata title(s) to the assignee transferee or chargee as and when required by the First Party.

[25] It is crystal clear to us from cl. 8 above that the plaintiff had consented to the contra units to be assigned, transferred or charged to third party or third parties including the bank for the purpose as collateral for the bridging loan. The issue of free from encumbrances raised by the plaintiff was therefore a nonstarter and not a live issue.

[26] We further agreed with the defendant that even if the defendant had defaulted in the payments under the settlement agreement which is denied by the defendant, the plaintiff's remedy is confined to taking a fresh action to enforce the settlement agreement and not by way to execute the judgments and/or order which was rendered otiose by the settlement agreement.

[27] The Singapore Court of Appeal in *Indian Overseas Bank v. Motorcycle Industries [1973] Pte Ltd and Others* [1992] 3 SLR (R) 841 held:

> 13 The effect of a settlement or compromise agreement is stated in *Halsbury's Laws of England* vol 37 (4th Ed) at para 391 as follows:
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> > Where the parties settle or compromise pending proceedings, whether before, at or during the trial, the settlement or compromise constitutes a new and independent agreement between them made for good consideration. Its effects are (1) to put an end to the proceedings, for they are thereby spent and exhausted; (2) to preclude the parties from taking any further steps in the action, except where they have provided for liberty to apply to enforce the agreed terms; and (3) to supersede the original cause of action altogether …
> >
> > An agreement for a compromise may be enforced or set aside on the same grounds and in the same way as any other contract …

[28] With due respect to the learned JC, we are of the view that His Lordship erred in law in holding that this case is distinguishable on its own facts. In arriving at the above decision, the Singapore Court of Appeal applied the principles stated by the English Court of Queen's Bench Division in *Green v. Rozen* [1955] 1 WLR 741. The facts were as follows:

A The plaintiff had brought an action to recover £500 money lent by him to the defendants jointly, and a further sum of £50, alleged to have been due from the first defendant as consideration for making the loan to the three defendants. When the action came on for hearing, Counsel informed the Court that the action had been settled and what the terms of settlement were. By the agreed terms, which were set out on the backs
B of Counsel's briefs and signed by Counsel for both parties, the defendants were to pay to the plaintiff a sum of £450 by instalments, on the dates stated, and the taxed or agreed cost with the final instalment. If any instalment was in arrear, the whole debt and costs became due and payable at once. The defendants having failed to pay the last instalment and the costs, the plaintiff made an application in the original action
C asking for judgment for the amount of the final instalment and an order for the costs. Slade J held that the application must be refused because, the Court have made no order in the action, the agreement compromising the action between the parties completely superseded the original cause of action and the Court had no further jurisdiction in respect of that cause of action. His Lordship went on the say that if the terms of the new
D agreement were not complied with, then the injured party must seek his remedy on the new agreement. In other words, the plaintiff's only remedy was to bring an action on the agreement of compromise.

[29] The principles laid down in the *Indian Overseas Bank* (*supra*) was
E applied by the Singapore Court of Appeal in *Turf Club Auto Emporium Pte Ltd and Others v. Yeo Boong Hua and Others and Another Appeal And Other Matters* [2017] 2 SLR 12 where the court held *inter alia*, that a settlement agreement which had been entered into for good consideration had the following effects: (a) it would put an end to the proceedings, which would thereby be spent and exhausted; (b) it would preclude the parties from taking any further steps in
F the action, except where they had provided in the settlement agreement for liberty to apply, in the same action, for the purpose of enforcing the agreed terms; and (c) it would supersede the original cause of action altogether.

[30] In *Sambu (M) Sdn Bhd v. Stone World Sdn Bhd & Anor* [1996] 2 CLJ
G 523, Abdul Malik Ishak J (later as JCA) held that where the parties had settled or compromised pending proceedings, the settlement would put an end to the proceedings, preclude the parties from taking further steps in the action and supersede the original cause of action.

Conclusion

H **[31]** For the reasons above, we find merits in the appeal. The appeal was allowed with cost of RM7,000 subject to payment of allocatur fee. We set aside the decision of the High Court.

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